~~NO. 81283-7~~ 83768-6

SUPREME COURT OF THE STATE OF WASHINGTON

JANE ROE,

Appellant,

v.

TELETECH CUSTOMER CARE MANAGEMENT (CO), LLC,

Respondent.

AMICUS CURIAE BRIEF OF WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTEREST OF AMICUS CURIE

The Washington Employment Lawyers Association ("WELA") is an organization of lawyers licensed to practice law in the State of Washington devoted to protection of employee rights. *See* WELA Mot. (filed concurrently).

II. INTRODUCTION

An employee in this State should not have to make the choice between keeping her job and treating an illness. A blanket drug-testing policy like that of Respondent-Defendant Teletech Customer Care Management, LLC ("Teletech") forces Plaintiff-Appellant Jane Roe and others like her to make precisely that choice.

This Court recognizes the public policy tort exception to the State's at-will doctrine to ensure that an employer's power to fire does not overwhelm significant public interests. The interests at stake here include those of patients and doctors to treat certain debilitating illnesses with medical marijuana outside the workplace, in compliance with Washington State's Medical Use of Marijuana Act ("MUMA").

For reasons stated here, and by Plaintiff and amicus curiae American Civil Liberties Union of Washington ("ACLU"), WELA respectfully requests the Court reverse the decision of the Court of Appeals. The parties have extensively briefed whether MUMA creates an

implied cause of action against employers who terminate employees in non-safety positions based solely on physician-authorized, off-site use of medical marijuana. While WELA strongly urges the Court to imply a cause of action under MUMA, this brief focuses on Ms. Roe's second cause of action arising under the tort of wrongful discharge. Here, Teletech fails to show a legitimate business interest in firing Ms. Roe for off-site use of medical marijuana where no safety or performance problems are presented. On balance, Teletech's generalized interest in workplace safety does not override the public policy safeguarding private medical decisions.

III. STATEMENT OF THE CASE

WELA hereby incorporates the facts and procedural history in Plaintiff-Appellant Jane Roe's Opening Brief, filed June 16, 2008. *See* Roe Br. at 6-12.

IV. ARGUMENT

A. The Common Law Tort Of Wrongful Discharge

With the Court's decision in *Thompson v. St. Regis*, Washington joined a "growing number of jurisdictions" to recognize the common law tort of wrongful discharge as an exception to the at-will employment doctrine. 102 Wn.2d 219, 232-233, 685 P.2d 1081 (1984). In addition to safeguarding important public policy interests, the tort protects individual

job security against employer actions that offend civic mandates. *See id.* at 233. Thus, for example, the Court has determined that an employee's exercise of certain legal rights, such as filing a workers' compensation claim, must be protected against adverse personnel decisions. *E.g., Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wn.2d 46, 75-76, 821 P.2d 18 (1991) (upholding public policy tort claim where employees terminated for seeking workers' compensation). A claim of wrongful discharge has four elements, the first three of which the plaintiff bears the burden to prove. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). Here, Ms. Roe must show: (1) that a clear public policy exists to protect her decision to follow the advice of her doctor and treat with medical marijuana (the "clarity" element); (2) being fired from her job jeopardizes that decision (the "jeopardy" element); and (3) her off-site medical marijuana use caused the dismissal (the "causation" element). Teletech then has the burden on the fourth element to show that its reason for firing Ms. Roe "overrides" the public policy mandate (the "absence of justification" element). *Id.* at 941.

The third element, causation, is not contested here; Teletech does not dispute that Ms. Roe's off-site medical marijuana use is the sole reason for her dismissal. In the interest of avoiding repetition, WELA joins the ACLU in its analysis of the clarity and jeopardy elements – save

for additional discussion of issues not fully explored by the parties or amici. In particular, WELA addresses: (a) the Court's province to define whether a mandate of public policy exists, (b) the limited circumstances where the "overriding justification" defense applies, (c) the application of the "overriding justification" defense, and (d) the Court's role in balancing the employer's interest against public policy.

B. It Is The Court's Role To Determine Whether A Clear Mandate Of Public Policy Exists

Teletech may urge the Court to ignore the ACLU's discussion of statutory and constitutional sources of public policy at issue in this case (other than MUMA itself). *See* Teletech Resp. to ACLU Mem. at 2 (arguing that only Ms. Roe can frame public policy). Teletech is mistaken. Ms. Roe's third assignment of error sufficiently sets out a clear statement of public policy – albeit one that the ACLU explores in greater detail with additional statutory and constitutional sources. *See* Roe Open. Br. at 2 ("Does Washington public policy prohibit an employer from discharging an employee solely because of her physician-authorized, off-site use of medical marijuana in accordance with MUMA?").

In any event, the Court is not bound by the parties' briefing in analyzing questions of law; rather, it is the province of the Court to determine whether a clear mandate of public policy exists.

Danny v. Laidlaw, 165 Wn.2d 200, 207, 193 P.3d 128 (2008) (whether a clear public policy exists is a "question of law" for the Court); *id.* at 233 (same) (J. Fairhurst, concurring). On such pure questions of law, the parties need not list every statute, code, or case; rather, "any court is entitled to consult the law in its review of an issue, whether or not a party has cited that law." *Ellis v. City of Seattle*, 142 Wn.2d 450, 459 n.3, 13 P.3d 1065 (2000) (noting that Court of Appeals' analysis of clarity element was "misguided" for failure to consider other sources of public policy raised on appeal). In *Gardner*, for example, the Court conducted its own analysis of criminal cases and statutes to enunciate a clear mandate of public policy of safeguarding human life – one the plaintiff had not fully briefed. 128 Wn.2d at 940, 944-45. The Court reasoned that the question presented was sufficient to frame the issue. *Id.* at 940 (relying on broadly-stated question certified from federal district court to encompass sources of public policy on which "Plaintiffs did not focus").

As in *Gardner*, this Court must look beyond the parties' briefing to determine whether a clear mandate of public policy exists. Coupled with the strong humanitarian expression of the voters in MUMA, WELA respectfully urges the Court to consider the significant societal interests in protecting the doctor-patient relationship and the right of medical self-determination. *See* ACLU Br. at 4-15.

C. The Overriding Justification Defense Is Available In Limited Circumstances Where A Defendant Concedes Causation

In the typical wrongful termination case, causation is contested: the plaintiff contends that her public-policy linked conduct (e.g., jury duty, whistle blowing, filing a workers' compensation claim, etc.) was the reason for dismissal, while the employer contends it was something else (e.g., absenteeism, insubordination, poor performance, etc). In these cases, the plaintiff has the burden to prove that the public-policy linked conduct was the "substantial factor" leading to her dismissal. *See Wilmot,* 118 Wn.2d at 71 ("Under the substantial factor test, if the [protected activity] was a significant or substantial factor in the firing decision, the employer could be liable, even if the employee's conduct otherwise did not entirely meet the employer's standards."); *see also Allison v. Seattle Housing,* 118 Wn.2d 79, 89, 821 P.2d 34 (1991) (holding that substantial factor test applies to public policy tort).[1] Said another way, the causation standard in a wrongful termination claim is not a "but for" test. *Allison,*

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[1] The Washington Pattern Jury Instructions define the term "substantial factor" to mean "a significant motivating factor in bringing about the employer's decision. 'Substantial factor' does not mean that [the protected trait] was the only factor or the main factor in Defendant's decision to terminate or that the Defendants would not have been terminated but for her [protected trait]." WPI 330.01.01. The federal "same decision" affirmative defense has been rejected by Washington courts. *See Mackay v. Acorn Custom Cabinetry,* 127 Wn.2d 302, 898 P.2d 284 (1995) (Madsen, J. dissenting) (citing majority's failure to apply federal affirmative defense).

118 Wn.2d at 89. Thus, the jury cannot require plaintiff to prove that the *only* reason for termination was the protected activity – only that it was the substantial reason for firing her.

In rare cases, as here, the defendant concedes that the reason for the dismissal was the plaintiff's public-policy-linked conduct, but asserts that its legitimate business reason nevertheless justifies the decision. In these circumstances, the burden shifts to the defendant to make out an "overriding justification" defense. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 440, 191 P.3d 879 (2008) (citing *Gardner*, 128 Wn.2d at 941); *Hubbard v. Spokane County*, 146 Wn.2d 699, 718, 50 P.3d 602 (2002); *see also Wilmot*, 118 Wn.2d at 68.

In fact, the overriding justification defense *only* makes sense where the defendant concedes causation, as here. Otherwise, the jury is left with a "mixed motive" case, as described above:

> In the mixed-motive case, the employer asserts that the real motive for the dismissal had nothing to do with public policy. In the business necessity [or "overriding justification"] case, the employer admits that the dismissal related to conduct protected by public policy but asserts that the employer's interests in the circumstances should override the jeopardy to public policy.

Perritt, Henry H., *Employee Dismissal Law and Practice*, § 7.08 at 7-100 (5th ed. 2010 supplement) ("Proving Overriding Justification").

A useful analogue to the overriding justification defense is found in the bona fide occupational qualification ("BFOQ") defense to discrimination claims. That is, an overriding justification defense must assume public policy-linked-conduct, but enables the employer to show that its business decision *overrides* public policy. Likewise, the BFOQ defense presupposes discrimination, but allows otherwise unlawful discrimination where it is "essential to ... the purposes of the job." *E.g.*, *Hegwine v. Longview Fibre Co., Inc.*, 162 Wn.2d 340, 172 P.3d 688 (2007); *Rose v. Hannah Mining Co.*, 94 Wn.2d 307, 312, 616 P.2d 1229 (1980); WAC 162-22-070(3); *see also* Perritt, § 7.08 at 7-102.2 (analogizing overriding justification defense to BFOQ).

Notably, the BFOQ defense is not available where the defendant-employer simply makes generalizations about protected classes of people. *E.g.*, *Hegwine*, 162 Wn.2d at 358 (holding that defendant failed to show that all pregnant women could not meet the lifting requirements of a customer service position); *Rose*, 94 Wn.2d at 312 (reasoning that one doctor's affidavit was not sufficient to show that "all or substantially all" persons with epilepsy could not perform as laborer in smelter plant); *Blanchete v. Spokane Co. Fire Prot. Dist. No. 1*, 67 Wn. App. 499, 836 P.2d 858 (1992) (reasoning that defendant's medical fitness standard was

not sufficient to show that all or substantially all persons with Chrohn's disease could not perform as firefighters).

D. Teletech's Generalized Allegations About Workplace Safety And Tort Liability Do Not Amount To Overriding Justifications For Termination

This Court has had the opportunity to address the overriding justification defense in detail just once in *Gardner v. Loomis*. There, the Court concluded that the defendant-employer showed a legitimate interest in protecting the safety of its workers and the contents of its armored trucks; still, it ultimately concluded that such an interest did not outweigh the public policy of safeguarding human life. 128 Wn.2d at 947-48.

A leading treatise on the subject, from which the *Gardner* court adopted the four-element tort, confirms that the burden of production and persuasion should rest with the defendant on this last element – an element the author alternately terms the "business necessity defense." Perritt, § 7.08 at 7-101 (5th ed. 2010 supplement) ("justification is a privilege . . . the defendant has the burden with respect to privileges") (citing Restatement (Second) Torts § 870 cmt., e, j)). Indeed, it is difficult if not impossible to imagine how an employee could meet a burden that requires her to prove a negative (i.e., an "absence" of justification). Moreover, the plaintiff is simply not in a position to say (or prove) what the defendant's

business interest is, and why it is important. Perritt explains the allocation of burdens where, as here, causation is conceded:

> The evidence of the special circumstances of the employer's business [that are allegedly strong enough to override public policy] would be within the employer's control. Therefore it is fair to put the burden of production on the employer. The burden of persuasion also should be placed on the employer because the proposition advanced by the employer is disfavored as contrary to public policy and is counterintuitive.

Id. at § 7.08, 7-103 (citing McCormick on Evidence § 336 at 948-49 (3rd ed. 1984)).

In this case, Teletech provides two related justifications for its decision to fire Ms. Roe from her non-safety sensitive customer service position. It contends it has a legitimate interest in promoting a "safe, healthy, productive, and efficient work environment." Teletech Br. at 9 (citing CP 221), 44-45. And it contends that it has an interest in protecting itself from the risk of vicarious liability that arises when employees commit tortious acts under the influence of illegal substances. Teletech Br. at 46. The company apparently achieves these goals, at least in part,

by enforcing a blanket drug policy to prevent "unlawful or improper *presence* or *use* of drugs or alcohol *in the workplace*." *Id* at 9.[2]

On this evidence, Teletech's non-controversial interests of workplace safety and risk management are simply not implicated. Ms. Roe has never sought on-site accommodation of "unlawful or improper" drugs; and Teletech does not allege (let alone prove) she was ever impaired while on duty. What is more, evidence indicates that Ms. Roe was significantly *more* "healthy, productive, and efficient" after she treated her debilitating condition with medical marijuana. Roe Br. at 7-8 (citing CP 261, 266, 267; Roe Decl.).

Further, Teletech offers no evidence, medical or otherwise, to show that an employee's off-site doctor-supervised use of medical marijuana results in workplace impairment. By Teletech's logic, off-site drinking would justify dismissal. Such generalized company policies, like

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[2] Teletech also argues that it has an overriding justification to refuse to employ individuals "who report to work under the influence of illegal substances." Teletech Br. at 44. It is doubtful that anyone would argue with this stated interest, but again, there is no evidence to indicate that workplace impairment is at issue in this case. Teletech's reliance on *Robinson v. Seattle* on this point is likewise misplaced. In *Robinson*, the court upheld a constitutional challenge to the City's drug testing policy on grounds that it was not narrowly tailored to the City's public safety interests in light of employee privacy concerns. 102 Wn. App. 795, 801, 10 P.3d 452 (2000). If anything, the analysis in *Robinson* suggests that Ms. Roe's interests outweigh those of Teletech.

the failed BFOQ defenses discussed above, do not amount to evidence sufficient to show a legitimate interest in regulating off-site medical marijuana use. *Cf. Slohoda v. United Parcel Serv., Inc.*, 475 A.2d 618, 622 (N.J. App. 1984) (reversing summary judgment for employer, holding that inquiry into employee's off-site sexual activities could give rise to tort liability); *Geary v. U.S. Steel Corp*, 319 A.2d 174, 180 (Pa. 1974) ("There are areas of an employee's life in which his employer has no legitimate interest.").

E. The Public Policy Tort Requires The Court – Not The Jury – To Balance The Employer's Interests Against Public Policy

Even if the Court concludes that Teletech satisfies its burden of production on summary judgment to show a legitimate business interest for Ms. Roe's termination, it should conclude that the balance of interests in this case favors public policy protecting private medical decisions.

On review of summary judgment, the *Gardner* court recognized that it was the *court's* – not the jury's – role to "weigh" the competing interests. 128 Wn. 2d at 942 ("the overriding justification element enables *this court* to weigh properly [defendant's] argument, which claims [its] workplace rule should trump any public policies furthered by [plaintiff's]

actions.") (emphasis added). On conducting this balancing, the Court concluded that the employer's interest in protecting workplace safety was legitimate, but nevertheless concluded that it did not outweigh the public interest in saving lives:

> If our society has placed the rescue of a life above constitutional rights and above the criminal code, then such conduct clearly rises above a company's work rule. Loomis' work rule does not provide an overriding justification for firing Gardner when his conduct directly served the public policy encouraging citizens to save persons from serious bodily injury or death.

128 Wn. 2d at 949.[3]

Cases from other jurisdictions are in accord. For example, the Oregon Supreme Court in *Nees v. Hocks*, reasoned that an employer could be held liable for discharging an employee who answered a subpoena for jury duty. 536 P.2d 512, 515-516 (1975). In its analysis, the Court implicitly accepted the role of weighing the interests of the employer

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[3] To the extent there is any doubt that the balancing of interests is conducted by the court (as opposed to the jury), one need only look to the dissenting opinion in *Gardner*, criticizing the majority opinion for engaging in such analysis. 128 Wn.2d at 952 ("the result of the majority's analysis is that the public policy exception [occurs]...where this court disagrees with an employer's definition of just cause for termination....") (Madsen, J. dissenting); *see also Danny*, 165 Wn.2d at 225 (clarifying to the concurrence/dissent that the "balancing" in *Gardner* was part of the "absence of justification" element analysis).

against those of the public in protecting the justice system and encouraging jury service. *See id.* at 516, n.2 (noting that had employer sought waiver of jury service for just one month, the court would regard such a personnel decision as "justifiable"); *accord Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 23-24 (N.J. 1992) (conducting balancing of employee privacy and employer interests; upholding drug-testing for safety-sensitive positions). Employment law expert Henry Perritt, Jr. explains the rationale for leaving the balancing of interests to the court:

> It is desirable for the judge to retain control over the balancing process. Only in this way can the appellate courts retain adequate control over the direction in which the public policy balance is struck. If juries are allowed to strike the balancing in individual cases, the constraints on employer discretion will be unpredictable and the outcomes largely immune from appellate review.

Perritt, § 7.08 at 7-101.[4]

On this record, the court should conclude that the balance tips sharply in favor of safeguarding an employee's private medical decisions. Teletech's interest in regulating an employee's off-site medical marijuana

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[4] Because the Court retains the role of balancing the competing interests, questions of whether the overriding justification defense applies should ordinarily be resolved in advance of trial. To be sure, a jury may be called upon to resolve underlying factual disputes, *e.g.*, whether the employer's stated interest was the real reason for the discharge, and not simply a pretext.

use is tenuous, at best, while Ms. Roe's interest in treating her debilitating condition under her doctor's advice is overwhelming. What is more, Teletech's legitimate interests are simply not implicated by the medical use of marijuana without any evidence of use or impairment while at work.

If the employer contests causation or if the Court determines that the public policy outweighs the employer's interest, the jury is not instructed on the overriding justification defense (other than to resolve factual disputes). The jury *should* be instructed that defendant denies that an illegal reason was a substantial factor and that it was motivated by a legitimate business reason. If the employer can convince the jury of that, then defendant prevails. But just like any discrimination case, the ultimate question is not whether the employer had a legitimate reason, but whether the employer was motivated by an illegal reason. In the ordinary case, a finding that the employer was motivated by a legitimate interest will not be a defense to liability, if the jury also finds a substantial factor. The overriding justification defense is not the ordinary case – when it applies, it allows the employer's interest to trump the substantial factor on the Court's balancing of interests.

As demonstrated in *Gardner*, not every legitimate business reason will suffice as an overriding justification sufficient to override the public

policy promoted by an employee's conduct. Because it is the Court's role to weigh the competing interests, a jury does not have the discretion to decide otherwise. For example, consider an employee who was fired from her job when she refused to illegally dump toxic waste. If the employee can prove that her refusal to illegally dump the waste was a substantial factor leading to her dismissal, she should prevail – even though the employer may also have been motivated to terminate her because of insubordination (a legitimate reason). If the jury is left to weigh the competing interests, there is a real danger of transforming the plaintiff's burden on causation from a substantial factor to an *only* factor test. Said another way, if the jury is empowered to decide that the stated interest of the employer overrides public policy, it effectively forces the plaintiff to prove that the illegal reason (refusal to dump toxic waste) is the *only* reason for her termination. Under no circumstances should the employee have to prove "substantial factor" and *also* prove the absence of an overriding justification.

V. CONCLUSION

For the reasons stated here, WELA respectfully requests that the Court reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this **20th** day of **December, 2010**.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 20th day of December 2010, a true and correct copy of the forgoing Amicus Brief was served on the persons hereinafter named by depositing said copies in the United States mail, postage prepaid, addressed as follows:

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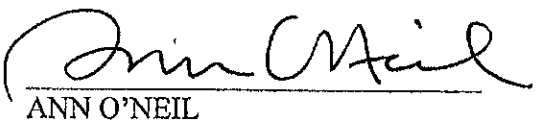

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